UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

WINCO, INC.[1]

Employer

and Case 36-RC-6038

GENERAL TEAMSTERS LOCAL UNION
NO. 324, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Petitioner

and

MYRTLE CREEK HOURLY ASSOCIATION

Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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[1] The name of the Employer was corrected at hearing. It is properly WinCo, Inc.

[2] A brief was received from the Employer and duly considered.

> All warehouse, clerical, secretarial, and janitorial employees and working foremen employed by the Employer at its Myrtle Creek, Oregon, facility; but excluding all employees provided by temporary employment agencies, and guards and supervisors as defined by the Act.

The Employer is engaged in the operation of a nonfoods distribution center in Myrtle Creek, Oregon.[3] Petitioner seeks a unit of all hourly employees as described above.[4] The Employer and Intervenor contend that a contract bar exists. Petitioner contends that Intervenor is not a labor organization within the meaning of the Act, and that there is no contract bar.

The Employer commenced operations at the Myrtle Creek facility in April 2000. In July 2000, the Employer recognized Intervenor as the collective bargaining representative of the employees, based on a petition signed and dated by a majority of the employees stating that they wished to be represented for the purpose of collective bargaining with respect to wages, hours, and working conditions by Intervenor.[5]

Heidi Lander, representative of Intervenor, testified that she is an employee of the Employer in the Myrtle Creek facility. She had previously worked in the Employer's Corvallis, Oregon, facility, where there was an employee association which had an agreement covering terms and conditions of employment. When she transferred to the Myrtle Creek facility, she wanted to have a similar association in the new facility. She contacted Roger Cochell, the Employer's vice president of labor and human resources, and asked him how to set up an employee association. He told her that she needed to get the signatures of employees on a statement that they wished to be represented for collective bargaining, and to notify him when she had finished collecting signatures. Thereafter, she addressed a group of employees in the morning prior to the start of work, described the organization in Corvallis to them, and told them that if they wanted such an organization in Myrtle Creek, they needed to sign up. She collected signatures from a majority of the employees at that time, and presented them to Cochell.

Thereafter, on August 2, three representatives of the Employer and five representatives of Intervenor met at a location in Roseburg, Oregon, for the purpose of negotiations. Spokesperson for the Employer was Cochell. Prior to the meeting, Cochell had submitted to Intervenor a full contract proposal which was essentially an Employer policy document which he had composed at the time the facility opened and in which wages, benefits, and working conditions were specified.

Among other things, the contract proposal offered wage increases for the next five years. In negotiations, the parties agreed to a provision for a wage-reopener at any time during the five years if Intervenor could show that wage rates in the Myrtle Creek facility were no longer competitive. This provision became an addendum to the contract.

In addition, the parties negotiated a second addendum which provided that for temporary employees who become permanent employees of the Employer, the seniority date will be the original date of hire. Further, included in the contract itself, the parties negotiated that the final

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[3] Also referred to in the record as Riddle, Oregon.

[4] The parties stipulated that such unit is a unit appropriate for collective bargaining.

[5] Intervenor is named on the document as "WinCo #94 Hourly Employees Association Committee."

step in wage progression as proposed by the Employer was eliminated, allowing employees to reach the top step sooner.

On about August 4, the Employer submitted the final version of the contract to Intervenor for signature. The five representatives of Intervenor who had attended the negotiating meeting signed it on September 19. Their signatures appear as the signatures of individuals, without further identification; there is no statement that they are signing on behalf of other employees or Intervenor. Cochell signed on behalf of the Employer. His signature is not dated.

The contract does not include any formal term of agreement provision, nor does it state the date on which it becomes effective. On the signature page beneath the signature of Cochell on behalf of the Employer is a note, "Expiration 1/17/05." Just above that note is another note: "Ratification: _____" with the date 9/19/00 filled in by hand. Otherwise there is no express provision for ratification in the contract. The document is entitled "WINCO, INC. DISTRIBUTION CENTER RIDDLE, OREGON HOURLY EMPLOYEE WORKING CONDITIONS & WAGES AGREEMENT." There is no statement identifying the parties to the agreement.

In addition, the signed contract contains a provision, Section Q, which states that "WinCo reserves the right to alter this Employee Hourly Working Conditions and Wages document at any time." Witnesses for both the Employer and Intervenor testified that Section Q was a leftover from the document originally composed by Cochell in April 2000 and neither party had noticed its inclusion in the final contract draft prepared by the Employer after the August 2 meeting. On December 1, after the November 21 filing of the petition, Cochell sent a letter to Intervenor stating that he had just noticed the presence of Section Q in the signed contract, that it is a typographical error, that the Employer waives Section Q and any right to alter the agreement during its life. There is no document in evidence signed by Lander or other representative of Intervenor acknowledging that Section Q was included in the final contract in error.

Lander testified that at some point prior to the time that the above-described petition was submitted to the Employer, about 20 employees in the breakroom chose her by acclamation to be the chairperson of Intervenor, and that the other four members of the negotiating committee, which became the governing committee, were chosen by ballot. The governing committee meets about once a month. Intervenor has no bylaws or dues. The committee addresses management to resolve any problems raised by employees. At no time did Intervenor tell employees that all employees in the unit would have an opportunity to vote on any agreement that was reached with the Employer.

Cochell testified that the Employer had intended that the agreement be ratified before it became effective, but that there was no discussion as to the ratification procedure to be followed by Intervenor; that such procedure was left up to Intervenor. Lander testified that the committee of five was elected to represent the employees; she did not specifically testify to any discussions they had among themselves regarding any ratification procedure. It appears that Intervenor considered the signing of the contract by each individual member of the committee to constitute ratification.

Intervenor's status as a labor organization:

Petitioner contends that Intervenor is not a labor organization. At hearing, Petitioner's attorney declined to stipulate that Intervenor is a labor organization, and stated that Petitioner's position on the issue is based on Petitioner's belief that "the employees at WinCo in Myrtle Creek, the majority of the people have no idea what this bargaining agreement or association is."

Section 2(5) of the Act defines a "labor organization" as:

> [A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The record establishes that Intervenor was organized by Heidi Lander for the purpose of collective bargaining regarding wages, hours, and working conditions, and that Lander and four other individuals met with representatives of the Employer on August 2, 2000, with the intention to negotiate such matters with the Employer. Further, employees participate in Intervenor. At the time of the hearing, employee participation consisted of electing the members of the negotiating committee, and choosing Lander as the chairperson. Thus, Intervenor meets the definition of a labor organization in Section 2(5) of the Act, regardless of the fact that Intervenor does not have any formal structure. *Yale New Haven Hospital*, 309 NLRB 363 (1992); *Butler Manufacturing Company,* 176 NLRB 308 (1967). The Act is silent with respect to any requirement as to employees' knowledge or understanding of the nature of the relevant labor organization.

Therefore, I conclude that Intervenor is a labor organization within the meaning of the Act.

Contract bar issue.

Petitioner contends that the document identified in the record as a collective bargaining agreement between the Employer and Intervenor is not a bar to the instant petition.

The agreement in evidence herein presents a number of problems: nowhere does the document state that it is an agreement between the Employer and Intervenor; nowhere does it state the date on which it becomes effective; it includes a clause, Section Q, which permits the Employer to alter it unilaterally at any time.

With respect to the first such problem, it is difficult to find that a contract exists between two parties if the document purported to be the contract fails to name the parties who have entered into it. On its face, the contract herein is an agreement between the Employer and five individual employee signatories, with no indication that those five employees were signing on behalf of other employees as well, or on behalf of Intervenor. There is no evidence or contention that the document in evidence is merely a draft subject to final cosmetic refinement, or otherwise anything other than the final, formal version of the agreement.

Secondly, the contract plainly states that it expires on January 17, 2005, and it was "ratified" by the five employees on September 19, 2000. It appears, therefore, to be a contract of more than three years' duration. However, without a statement as to the date on which it becomes effective, the actual duration of the contract is not subject to determination. This is no minor defect. The Board's established policy with respect to contracts having terms of longer than three years is that such contracts bar an election only for their initial three years. *General Cable Corporation*, 139 NLRB 1123 (1962). The Board computes the term of a contract for bar purposes from the effective date of the contract. *Benjamin Franklin Paint and Varnish*, 124 NLRB 54 (1959). Thus, the contract is flawed for bar purposes because it lacks an effective date.

Third, while there is testimony by representatives of both the Employer and Intervenor who were present and closely involved in negotiations that it was never the intention of the parties to include Section Q in the agreement and that its presence there is an error, there is no document signed by both parties to that effect. There is only the Employer's unilateral statement, made after the filing of the instant petition, declaring that it waives Section Q. The Board has long held that, "the term, as well as the adequacy of a contract, must be sufficient on its face, with no resort to parol evidence necessary, before the contract can serve as a bar." *Jospeh Busalacchi, et al., d/b/a Union Fish Company*, 156 NLRB 187, 192 (1965); *Benjamin Franklin Paint and Varnish*, supra; *Cind-R-Lite Co*., 239 NLRB 1255 (1979). On its face, the contract is not an enforceable contract, but rather more of an intent or a hope or a plan.

Thus, the agreement herein is of indeterminate duration and further is in effect terminable at will by the Employer. The Board has determined that such contracts do not constitute a bar to an election. *Pacific Coast Association of Pulp and Paper Manufacturers*, 121 NLRB 990 (1958).[6]

I find, therefore, that no contract bar to an election exists herein, inasmuch as the document purported to constitute such a bar is *on its face* merely an agreement between the Employer and five individual employees; the document lacks any determinable fixed duration inasmuch as it fails to state any date on which it becomes effective; and the agreement is terminable at will by the Employer.[7] [8]

There are approximately 49 employees in the Unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike

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[6] The purpose of the Board's requiring a written signed document is to preclude later possible "convenient" claims by Employer and incumbent union, of the existence of pre-existing of oral agreements, which oral agreements would be very difficult for non-parties to disprove.

[7] I would, however, find that the ratification procedure followed by the members of the employee committee who signed the contract would have been adequate, had the contract itself been adequate. In *Appalachian Shale Products*, 121 NLRB 1160 (1958), the Board ruled that, "Where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar." Where the contract is expressly subject to ratification, but contains no requirement that employees of the Employer ratify the contract, the "condition precedent of 'ratification' means ratification as defined by the Union in its internal procedures." *Childers Products Company*, 276 NLRB 709 (1985). In this case, as Intervenor has no bylaws or other formalized procedures, "ratification" was implicitly defined by Intervenor's governing committee as meaning an activity engaged in by the members of the committee.

[8] We are not dealing here with any question of recognition bar, as the parties in fact were able to negotiate what for their purposes was a total agreement.

which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by GENERAL TEAMSTERS LOCAL UNION NO. 324, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; or by MYRTLE CREEK HOURLY ASSOCIATION.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before January 3, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 10, 2001.

DATED at Seattle, Washington, this 27th day of December, 2000.

/s/ PAUL EGGERT

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